AMERICANS UNITED FOR LIFE

Memorandum

To: **Interested Parties**
From: **Americans United for Life**
Date: **June 25, 2012**
Subject: **The Protect Life Act and its Application to the Affordable Care Act**

Contrary to longstanding principles of federal law, and in spite of the opposition of a strong majority of Americans, abortion was woven into the fabric of the Affordable Care Act (ACA),[1] the federal healthcare legislation enacted in March 2010. In order to remedy the serious abortion problems of the ACA, Congressional action is necessary.

The Protect Life Act, H.R. 358 and S. 877, modifies the ACA to comprehensively prohibit both funding for abortion and insurance coverage for abortion through the ACA.[2] The Protect Life Act also aligns the conscience protections contained in the ACA with the protection of the Hyde-Weldon Amendment (current federal law), guarantees respect for state conscience protections, and ensures that healthcare providers have an adequate means to enforce their basic civil right to provide care without being forced to participate in abortions.

Without the Protect Life Act, funds appropriated and authorized through the ACA will subsidize insurance plans that cover abortion and may pay directly for abortions; mandates within the ACA may be invoked to require insurance coverage for abortion; and state and federal conscience protections for healthcare providers are in jeopardy.

[1] Pub. L. 111-148 (2010).
[2] Additional legislation is necessary to address the ACA's mandated coverage for the abortion-inducing *ella* because the Food and Drug Administration has labeled the drug as a "contraceptive" despite its capacity to cause an abortion.

1. STATUTORY LANGUAGE IS NECESSARY TO PROHIBIT ABORTION FUNDING IN FEDERAL HEALTHCARE PROGRAMS.

To ensure that federal healthcare funds will not be used for abortions, an explicit prohibition (such as the Hyde Amendment, discussed *infra*) is necessary. Consider, for example, what originally happened with Medicaid. The legislation creating Medicaid did not mention abortion as a covered service. However, federal dollars were paying for abortion before the 1976 enactment of the Hyde Amendment,[3] demonstrating that without an explicit prohibition on abortion funding in a healthcare statute, administrative agencies will interpret the law to include it.

Federal courts have also held that, without the Hyde Amendment's explicit prohibition of abortion funding, abortion would fall within "many of the mandatory care categories including 'family planning,' 'outpatient services,' 'inpatient services,' and 'physician services.'"[4] These court decisions mean that without explicit language prohibiting abortion funding, mandatory abortion funding will be read into healthcare laws and legislation.

2. THE "STATUS QUO" PRIOR TO THE ACA PROHIBITED FUNDING FOR ABORTION AND FUNDING FOR INSURANCE PLANS THAT COVER ABORTION.

Federal law has historically treated the subsidization of insurance plans that cover abortions as equivalent to paying for abortions. The Hyde Amendment[5] and other federal programs, such as the Federal Employee

[3]Medicaid funded around 300,000 non-therapeutic abortions per year before the enactment of the Hyde Amendment. Since then, states have taken various approaches on abortion funding; however, they may not use federal Medicaid funds or state *matching* Medicaid funds for abortions, with limited exceptions (cases of rape, incest, and life of the mother).

[4]*See Planned Parenthood v. Engler*, 73 F.3d 634 (6th Cir. 1996). *See also Hope Medical Group for Women v. Edwards*, 63 F.3d 418 (5th Cir. 1995); *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 777 (1996); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 569 (1995).

[5] The Hyde Amendment, first enacted in 1976, and as included in the Omnibus Appropriations Act 2009, H.R. 1105, 111th Cong, 2009. Pub. L. No. 111-8 (2009).

Health Benefits Program (FEHBP), prohibit federal subsidies from supporting insurance plans that cover abortions, regardless of whether the federal dollars are used to *directly* pay for abortions.[6] The "status quo" prior to the ACA was that federal tax dollars were not used to pay for abortions or for insurance plans that cover abortions.[7]

Named after its original author, Rep. Henry Hyde,[8] the Hyde Amendment enacts a broad prohibition on the use of federal funds appropriated through the Labor, Health and Human Services (LHHS) Appropriations. The text states that "[n]one of the funds…shall be expended for any abortion,"[9] *and* that "[n]one of the funds … shall be expended for health benefits coverage that includes coverage of abortion."[10] Thus, Hyde prohibits both "direct" and "indirect" abortion-funding.

Though it was operative law during the healthcare debate, the Hyde Amendment has a limited application.[11] If a program's funding does not

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[6] For example, in the Federal Employees Health Benefits Program (FEHBP), the government contributes to premiums of federal employees in order to allow them to purchase private health insurance. The Financial Services and General Government Appropriations bill that provides funding for the FEHBP has (each year since 1983, with the exception of 1993 through 1995) prohibited these government contributions from being used for enrollment in insurance plans that cover abortion. Pub. L. No. 111-8, §§613-614 (2009).

[7] At the time of the healthcare reform debate, no government health plans covered abortion (with limited exceptions), including Medicaid, the Federal Employees Health Benefits Program, the State Children's Health Insurance Program, and other programs.

[8] Henry Hyde (R-IL) was a member of the House of Representatives from 1975 to 2007, representing the 6th District of Illinois. Rep. Hyde chaired the Judiciary Committee from 1995 to 2001, and the House International Relations Committee from 2001 to 2007. Hyde, Henry John, Biographical Directory of the United States Congress, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=H001022 (*last visited* June 12, 2012).

[9] Hyde Amendment *supra* note 4, §507(b).

[10] *Id*. §507(c).

[11] In August 2010, at the Organizing for America National Health Care Forum, President Obama attempted to assuage pro-life constituents by stating, "There are no plans under health reform to revoke the existing prohibition on using federal taxpayer dollars for abortions. Nobody is talking about changing that existing provision, the Hyde Amendment. Let's be clear about that. It's just not true." President Barack Obama, *Remarks By the President in the Organizing for America National Healthcare Forum*,

pass through the LHHS appropriations process, the Hyde Amendment does not apply (unless the Hyde Amendment is applied by reference in another statute).[12]

The funding streams created by the ACA do not pass through the LHHS appropriations process; rather, the ACA directly appropriates funds to its new programs. The Hyde Amendment, therefore, does not apply.

3. ACA SUBSIDIZES INSURANCE PLANS THAT COVER ABORTION AND DIRECTLY FUNDS ABORTIONS.

The ACA violates the principles of the Hyde Amendment by allowing federal subsidies to be applied to insurance plans that cover abortions. Other provisions of the ACA could be used to mandate abortion coverage by plans that participate in Exchanges and even require *all* insurance providers to cover abortions. Certain funding streams appropriated through the ACA lack even a prohibition on *direct* funding of abortions.

The Protect Life Act addresses each of these concerns.

a. THE STATE INSURANCE EXCHANGES

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available at http://www.whitehouse.gov/the-press-office/remarks-president-organizating-america-national-health-care-forum (*last visited* June 12, 2012). Members of Congress also repeated the claim that the Hyde Amendment barred abortion funding because it was "settled" law. For example, Sen. Durbin made the claim on *Hardball with Chris Matthews* (MSNBC TV, broadcast July 13, 2009) that the Hyde Amendment was "basically the settled law." MSNBC TV Transcript, *Hardball with Chris Matthews for Monday, July 13, 2009 available at* www.msnbc.msn.com/id/31905856/ns/msnbc_tv-hardball_with_chris_matthews/ (*last visited* June 12, 2012). However, there was no need to "change" or repeal the Hyde Amendment in order to fund abortion with federal dollars through healthcare reform. Whether the Hyde Amendment was being "attacked" or was "settled" was irrelevant to whether abortion could be funded with federal funds authorized and/or appropriated through healthcare reform.

[12] *See e.g.*, 25 U.S.C. Sec. 1676 which applies any abortion funding limitation found in Department of Health and Human Services (HHS) appropriations (the Hyde Amendment) to the Indian Health Service (even though it is funded through the Interior Appropriations Bill).

The abortion language of the ACA routes federal subsidies to insurance plans that cover abortions.[13]

While the ACA does not allow federal dollars to directly pay for abortions within the Exchanges[14] (other funding streams that allow direct abortion funding will be discussed *infra*), the law actually *mandates* that every person who participates in the Exchanges and whose insurance plan covers abortion *directly* pay a minimum of $12 per year in order to fund abortions, even if that enrollee never intends to have an abortion or has a religious, ethical, or moral objection to abortion.[15]

Adding to the concern is the ACA's restriction against notice of a qualified health plan's abortion coverage except at the time of enrollment and the specification that such notice can only be part of the summary of benefits and coverage explanation.[16] Regardless of whether the restrictions were intentionally inserted into the ACA with this design in mind, they effectively create a "secrecy clause" that may prevent Americans—who do not want to pay for abortions— from rejecting insurance plans with abortion coverage.

In addition, the limited prohibition on the use of federal dollars for abortions within the Exchanges was designed to disappear. The restriction lapses if Congress does not renew the Hyde Amendment, a vulnerable rider to an appropriations bill.[17] The abortion lobby actively and continuously campaigns for the removal of the Hyde Amendment. For example, the

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[13] ACA *supra* note 1, §1412(c). The subsidies are issued by the Department of the Treasury directly to the insurer.

[14] *Id.* §1303(b)(1)(B).

[15] *Id.* §1303(b)(2)(B).

[16] *Id.* (3) RULES RELATING TO NOTICE.—''(A) NOTICE.—A qualified health plan that provides for coverage of [abortions other than in cases of rape, incest, or the life of the mother] . . . shall provide a notice to enrollees, **only** as part of the summary of benefits and coverage explanation, **at the time of enrollment**, of such coverage. ''(B) RULES RELATING TO PAYMENTS.—**The notice described in subparagraph (A), any advertising used by the issuer with respect to the plan, any information provided by the Exchange, and any other information specified by the Secretary** shall provide information **only with respect to the total amount of the combined payments** for [abortions other than in cases of rape, incest, or the life of the mother] . . . and other services covered by the plan.(Emphasis added)

[17] *Id.* §1303(b)(1)(B).

National Organization of Women (NOW) has acknowledged, "[T]he Board of NOW is hereby instructed to develop a long-term strategy with other allied organizations for the defeat of the Hyde Amendment and that the grassroots level of NOW be urged to take action in an aggressive campaign to repeal the Hyde Amendment..."[18]

While the law allows a state to "opt-out" of including insurance plans that cover abortions within its insurance Exchanges,[19] the law changes the status quo. In the past, abortion coverage could not be federally subsidized; now, states must take *affirmative* legislative action to prohibit federal tax dollars from subsidizing plans that provide abortion coverage.

The "opt-out" is also limited in effect. It only allows a state to prohibit subsidies within its state Exchanges from being applied to abortion-covering insurance plans. For example, should Nebraska pass "opt-out" legislation, federal taxes collected from Nebraskans will still be used to subsidize abortion in non-opt-out states, such as California, New York, or Connecticut which is currently attempting to mandate insurance plans in its Exchange cover abortion as an "essential health benefit."[20]

In addition, the opt-out provision could be undermined by the preventive care for women mandate (discussed *infra*).

Executive Order 12535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act," (hereafter "the Executive Order"), signed by President Obama on March 24, 2010, acknowledges that the new healthcare law itself would not adequately maintain the principles of the Hyde Amendment:

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[18] *2010 NOW Conference Resolutions, Hyde and Seek-Repeal of the Hyde Amendment,* NATIONAL ORGANIZATION FOR WOMEN, http://www.now.org/organization/conference/resolutions/2010.html#Hyde (*last visited* June 12, 2012).

[19] ACA *supra* note 1, §1303(a).

[20] Connecticut's mandate appears to violate the spirit, if not the letter, of the ACA. §1303 (b)(1)(A)(i) states that the essential health benefits provision shall not be construed so as to require abortion coverage.

> [I]t is necessary to establish an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), consistent with a longstanding Federal statutory restriction that is commonly known as the Hyde Amendment.[21]

However, while the Order *referenced* the Hyde Amendment, it failed to *apply* its principles to ACA.

First, the Executive Order cannot change or negate statutory language. Executive orders can only have the "force of law" when they do not contradict the law. The fact that statutes cannot be overridden by executive orders or regulations has been affirmed by the United States Supreme Court. For example, in 2006, the Supreme Court struck down an executive order issued by President Bush to invoke military commission jurisdiction because Congress had *impliedly* prohibited such action. [22]

Second, the Executive Order requires "strict compliance" with the language of the ACA that is itself *inconsistent* with the Hyde Amendment (as aforementioned, the Hyde Amendment prohibits federal funding for abortion *and* federal funding for insurance plans that cover abortion). The Order directed the Secretary of the Department of Health and Human Services (HHS) to

> [D]evelop, …, a model set of **segregation guidelines** for State health insurance commissioners to use when determining **whether exchange plans are complying with the Act's segregation requirements,** established in section 1303 of the Act, for enrollees receiving Federal financial assistance.[23]

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[21] Full text of the Executive Order is *available at* http://edocket.access.gpo.gov/2010/pdf/2010-7154.pdf (*last visited* June 12, 2012) [hereinafter Executive Order].
[22] *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006).
[23] Executive Order *supra* note 18, §2.

Thus, the Executive Order and the ACA "departed from Hyde" in the same fashion that caused Rep. Bart Stupak (D-MI) and other members of Congress who oppose federal funding for abortion coverage to reject the Capps Amendment offered in the initial House bill: they "allow individuals receiving federal affordability credits to purchase health insurance plans that cover abortion."[24]

The Protect Life Act replaces the ACA's accounting gimmick with the principles of the Hyde Amendment. The Protect Life Act prohibits "funds authorized or appropriated" by the ACA from being used "to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion," with exceptions for rape, incest, and the life of the mother.[25]

The Protect Life Act explicitly permits the purchase of a separate supplemental coverage that covers abortion, provided it is paid for entirely by funds not authorized or appropriated by the ACA.[26] Private insurance companies participating in the Exchange could still offer supplemental coverage for abortions or a plan that includes abortion so long as premiums are paid for entirely with private funds and administrative costs and all services offered through such supplemental coverage are paid for using only premiums collected for that coverage or plan.[27]

It is also important to note that, under the Protect Life Act, every insurance company that included a plan in the Exchange that covers abortion must include a second plan that is identical to the first plan in every aspect *except* that it does not cover abortion.[28] Therefore, everyone who purchased insurance through the Exchange has access to the same coverage, with the only exception being that those who receive affordability credits cannot use those government dollars to purchase insurance plans that include abortion coverage.

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[24] Rep. Bart Stupak, *What Our Amendment Does*, POLITICO, Nov. 18, 2009, *available at* http://www.politico.com/news/stories/1109/29629.html (*last visited* June 12, 2012).
[25] H.R. 358 §2(a)(4). The Protect Life Act also ensures that no multi-state plans offered in an Exchange provide coverage for abortion. *Id.* §2(b).
[26] *Id.* §2(a)(4).
[27] *Id*.
[28] *Id.*

b. BROAD MANDATE AUTHORITIES

The ACA contains broad mandate authorities that apply to private insurance plans and are not subject to the restrictions on state Exchanges. Without a legislative restriction, such a mandate could be used to require funding for abortion. The Executive Order fails to close this loophole.

For example, the healthcare law mandates nearly *all* insurance plans cover "preventive services for women."[29] With limited exceptions, Americans will not be able to choose a health insurance plan that does not cover what is determined to be "preventive services for women."

An administrative agency, the Health Resources and Services Administration (HRSA), is responsible for determining what constitutes "preventive services." Because the law does not state that "preventive services" excludes abortion, HRSA is free to include abortion as a "preventive service."[30] The Executive Order does not forbid HRSA from including abortion or abortion-inducing drugs in the definition of "preventive care."

Although HRSA has not included abortion *per se* in its current guidelines for insurance plans, HRSA is not legislatively prohibited from including abortion in future guidelines. HRSA has already mandated coverage for other drugs and devices with known life-ending mechanisms of action, including the abortion-inducing drug *ella*, which have been labeled by the Food and Drug Administration as "contraception."[31]

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[29] ACA *supra* note 1, §2713(a)(4).

[30] In September 2010, Americans United for Life submitted a comment to HHS on its interim final rule for group health plans and health insurance issuers relating to coverage of "preventive services" under the ACA. AUL's comment detailing why it would be inappropriate to include abortion and abortion-inducing drugs under the "preventive care" mandate is *available at* http://www.aul.org/wp-content/uploads/2010/09/Americans-United-for-Life-Comment-on-OCIIO.9992.pdf (*last visited* June 12, 2012).

[31] In September 2011, Americans United for Life submitted a comment to HHS on the HRSA guidelines and HHS interim final rule for group health plans and health insurance issuers relating to coverage of "preventive services" under the ACA. AUL's comment addressing the inappropriate over-reach of the HRSA mandate and the insufficiency of the HHS proposed "accommodation" for a narrowly-defined category of "religious

The Protect Life Act ensures that no provision of the ACA will be used to create an abortion mandate.[32] It prohibits all provisions of the ACA, or any amendments thereto, from being "construed to require any health plan to provide coverage of or access to abortion services…" and clarifies that no Federal or non-Federal person or entity implementing the ACA may require abortion coverage, access to abortion, or training in abortion.[33]

c. DIRECT ABORTION FUNDING

Other funding streams created by the law lack any prohibition on even *direct* funding of abortion. Such funding streams include the $9.5 billion appropriated for Community Health Centers (CHCs)[34] and funds appropriated through the "high-risk pools."[35] Because federal courts have interpreted general "health care" language to include abortion, [36] it is likely a federal court will find that failure to exclude abortion coverage means these funds can cover abortion. Notably, pro-abortion groups have been

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employers" is *available at* http://www.aul.org/aul-comment-to-hhs-on-preventive-services/ (*last visited* June 12, 2012).

[32] H.R. 358 §2(a)(3). However, the Protect Life Act does not address the current HRSA guidelines which mandate coverage for abortion-inducing drugs labeled by the Food and Drug Administration (FDA) as "contraception." Other legislative action is necessary. For example, the Respect for Rights of Conscience Act (H.R. 1179 and S. 1467), though not repealing the guidelines, would comprehensively protect the conscience rights of Americans with religious, moral, or ethical objections.

[33] H.R. 358 §2(a)(3).

[34] The self- appropriated funds for CHCs were increased to $9.5 billion by the Reconciliation Act of 2010, H.R. 4872.

[35] Until 2014, when state insurance Exchanges begin, the Pre-Existing Condition Insurance Plan (PCIP) requires states to provide health coverage for individuals who have been uninsured for at least six months and have a pre-existing condition or have been denied health coverage because of a health condition, commonly referred to as "high-risk pools." States can either run this new program with resources made available by the ACA, or rely on the Department of Health and Human Services to provide coverage. *Pre-Existing Condition Insurance Plan, available at* http://www.healthcare.gov/law/provisions/preexisting/about/index.html (*last visited* June 12, 2012).

[36] *See supra* note 3.

campaigning to get abortions performed in such centers and to have Planned Parenthood clinics qualify to become CHCs.[37]

President Obama's Executive Order states that the Hyde Amendment will apply to the authorization and appropriation of CHC funds.[38] While this section may effectively prohibit the use of CHC funds for abortions if HHS enacts appropriate regulations (which it has failed, thus far, to do), a court might invalidate such regulations because there is no *statutory* prohibition in the ACA, and an executive order cannot override a statute.[39]

On July 29, 2010, HHS issued regulations on the high-risk pools, ensuring that the funds under that program will not be used for abortions (unless a court rules to the contrary). However, this action does not close other loopholes in the law. A statement by Nancy-Ann DeParle, director of the White House Office of Health Reform, confirms that they do not intend to enact similar restrictions. She wrote on the White House blog that:

> The [high risk pool] program's restriction on abortion coverage is not a precedent for other programs or policies [covered by the healthcare reform law] given the unique, temporary nature of the program and the population it serves.

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[37] Groups such as the Reproductive Health Access Project and the Abortion Access Project strongly advocate for the inclusion of abortion services in community health centers as part of providing "primary care" and preventive services. *See Frequently Asked Questions about Integrating Abortion into Community Health Centers*, REPRODUCTIVE HEALTH ACCESS PROJECT, *available at* http://reproductiveaccess.org/integrating_reprohealth/faq.htm (*last visited* June 12, 2012).

[38] Section 3 of the Executive Order states, "Under the Act, the Hyde language shall apply to the authorization and appropriations of funds for Community Health Centers under section 10503 and all other relevant provisions."

[39] The fact that statutes cannot be overridden by executive orders or regulations has been affirmed by the United States Supreme Court. For example, in 2006, the Supreme Court struck down an executive order issued by President Bush to invoke military commission jurisdiction because Congress had *impliedly* prohibited that action. *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006).

Pro-abortion groups, such as NARAL Pro-Choice America, have called the rule "unacceptable" and are lobbying for this limited policy to be rescinded.[40]

The Protect Life Act ensures that no funding streams created through the ACA may be used to fund abortion or insurance plans that cover abortions.[41] By writing the restriction into the law, the Protect Life Act safeguards against a court ruling ordering that abortion must be funded, and does not make a determination on abortion funding dependent on administrative rulings and agency interpretations which are subject to change.

4. ACA FAILS TO PROTECT CONSCIENCE.

The ACA prohibits discrimination *by insurance plans* participating in the new government Exchanges against a healthcare provider or healthcare facility unwilling to provide, pay for, provide coverage of, or refer for abortions.[42] However, it does not proscribe discrimination by *government entities*. This falls short of the protection encompassed in the Hyde-Weldon Amendment, added annually to LHHS appropriations bill and which applies to government entities.[43]

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[40] Press Release, NARAL Pro-Choice America, *477,858 pro-choice Americans sign letter opposing Obama Administration policy on high-risk pools* (Sept. 9, 2010), *available at* http://www.prochoiceamerica.org/media/press-releases/2010/pr09092010_highriskletter.html (*last visited* June 12, 2012). In September 2010, Americans United for Life submitted a comment on HHS' interim final rule to implement requirements in Section 1101 of Title I (pertaining to the creation of the Pre-Existing Condition Insurance Plan Program (PCIP program), or "high risk pools") of the ACA. AUL noted that, in light of long standing federal law prohibiting the use of federal tax dollars for abortions and the authority given by the ACA to the HHS Secretary to prohibit federal funding for abortions through the PCIP program, Section 152.19(b) of the regulation (prohibiting abortion funding) should be promulgated as a final part of the regulation. AUL's comment is *available at* http://www.aul.org/wp-content/uploads/2010/09/AUL-Comment-on-PCIP.pdf (*last visited* June 12, 2012).

[41] H.R. 358 §2(a)(4): "No funds authorized or appropriated by this Act (or an amendment made to this Act)…may be used to pay for any abortion… ."

[42] ACA *supra* note 1, §1303(b)(4).

[43] §§ 508 (d)(1) and (2) of the Hyde-Weldon Amendment (added annually to Labor, Health and Human Services appropriations bill) Consolidated Appropriations Act 2008, Pub. L. No. 110-161, §508(d), 121 Stat. 1844, 2209 (2007).

The Protect Life Act amends the ACA to be consistent with the Hyde-Weldon Amendment by proscribing discrimination by federal agencies and programs and by any state or local government that receives federal funding through the ACA.[44] Importantly, the Protect Life Act contains a private, individual healthcare provider right of action. Without a private right of action, healthcare providers are dependent on the government to pursue their cases and to enforce their rights. The recent weakening of federal regulations designed to protect conscience rights underscores the necessity for Congressional action in this regard; healthcare providers must have an effective means to enforce their legal rights.

Further, the Protect Life Act remedies the ACA's failure to ensure that its provisions will not preempt *state* conscience protections.[45] Forty-seven states provide some degree of conscience protection for healthcare providers.[46]

Notably, the ACA provides that "[n]othing in this Act shall be construed to relieve any healthcare provider from providing emergency services as required by State or Federal law, including… EMTALA."[47] The conscience protections contained in the Protect Life Act are not in conflict with the Emergency Medical Treatment and Active Labor Act (EMTALA).

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[44] H.R. 358 §2(a)(6)

[45] *Id.* §2(a)(5)(B) and (C).

[46] *See Healthcare Freedoms of Conscience*, DEFENDING LIFE 2012: BUILDING A CULTURE OF LIFE, DECONSTRUCTING THE ABORTION INDUSTRY, pp 545-570 (Americans United for Life 2012).Two states protect the civil rights of all healthcare providers, whether individuals, institutions, payers (public or private) who conscientiously object to participating in any healthcare procedure or service: Louisiana and Mississippi. Forty-five states protect the civil rights of only certain healthcare providers and/or institutions from participating in specific procedures (usually abortion only): Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. Conversely, three states provide no legal protection for the civil rights of healthcare providers: Alabama, New Hampshire, and Vermont.

[47] ACA *supra* note 1, §1303(d).

EMTALA does not require healthcare providers to perform abortions. In fact, EMTALA defines an "emergency medical condition" to an include that which places the health of an "unborn child" in serious jeopardy.[48] Thus, in its requirement to respond to an emergency in which a pregnant woman or "her unborn child" is in distress, healthcare personnel should stabilize the condition of both mother and child.[49]

However, abortion-advocacy groups are lobbying to reinterpret EMTALA to coerce participation in abortion. For example, the American Civil Liberties Union (ACLU) has asked the Centers for Medicaid and Medicare Services to construe EMTALA to force healthcare providers to perform abortions.[50] Moreover, since the ACA states that "nothing" relieves a healthcare provider from a duty to provide "emergency services" as defined by state or federal law, the conscience protections contained in the ACA would be moot if a state passed a law (or reinterpreted its law) to define abortion as an "emergency service."

The Protect Life Act ensures that the ACA may not be exploited for efforts to misuse emergency treatment laws to coerce healthcare providers into providing abortions. It clarifies that the requirement to provide care is subject to individual conscience. Healthcare providers are not excused from an obligation to provide care, but they are not required to define "care" as including abortion.

CONCLUSION

[48] 42 U.S.C 1395dd (e)(1)(A)(i).

[49] *Id.* (b)(1)(A)&(B). "If any individual…comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either--…further medical examination and such treatment as may be required to stabilize the medical condition, or for transfer of the individual to another medical facility…"

[50] *See* Press Release, American Civil Liberties Union, *ACLU Asks Government to Ensure that Religiously Affiliated Hospitals Provide Emergency Reproductive Health Services* (July 1, 2010), *available at* http://www.aclu.org/reproductive-freedom/aclu-asks-government-ensure-religiously-affiliated-hospitals-provide-emergency- (*last visited* June 12, 2012). *See also* Letter from Laura Murphy et al., Director, Washington Office, Am. Civ. Liberties Union, to Marilyn Tavenner, Acting Administrator and Chief Operating Officer, Centers for Medicare & Medicaid Servs. (July 1, 2010), *available at* http://www.aclu.org/files/assets/Letter_to_CMS_Final_PDF.pdf (*last visited* June 12, 2012).

On September 9, 2009, President Barack Obama addressed a joint session of Congress and stated, "And one more misunderstanding I want to clear up—under our plan, no federal dollars will be used to fund abortions, and federal conscience laws will remain in place."[51] The Protect Life Act fulfills that promise. It ensures that federal dollars will not be used to fund abortions or insurance coverage for abortion and provides clear federal conscience protections for healthcare providers.

Importantly, studies confirm the relationship between public funding and the incidence of abortion. The Guttmacher Institute, an organization whose mission includes working to "protect, expand and equalize access to information, services and rights that will enable women and men to…exercise the right to choose abortion," conducted a Literature Review in 2009 that shows strong consensus that abortion rates are reduced when public funding is restricted.[52] Specifically, Guttmacher reported:

> The best studies are the five that used detailed data from individual states and compared the ratio of abortions to births before and after Medicaid restrictions took effect. These found that 18–37% of pregnancies that would have ended in Medicaid-funded abortions were instead carried to term when funding was no longer available.[53]

Thus, the Protect Life Act's prohibition on the use of the ACA's funds for abortion and for insurance plans that cover abortion coincides with the

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[51] President Obama's address in its entirety, President Barack Obama, *Remarks by the President to a Joint Session of Congress on Health Care*, September 9, 2009, *available at* www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/ (*last visited* June 12, 2012).

[52] Stanley K. Henshaw, Theodore J. Joyce, Amanda Dennis, Lawrence B. Finer and Kelly Blanchard, *Restrictions on Medicaid Funding for Abortions: A Literature Review,* Guttmacher Institute, June 2009, *available at* http://www.guttmacher.org/pubs/MedicaidLitReview.pdf (*last visited* June 12, 2012). The review cites 20 academic studies documenting this relationship and only four that found the impact of public-funding on the abortion rate inconclusive.

[53] *Id*. at 27.

position of the majority of Americans who do not want their tax-dollars paying for abortions,[54] and it helps to achieve the shared goal of reducing the incidence of abortion.

In addition to respecting state conscience protections, and aligning the ACA with the Hyde-Weldon Amendment, the Protect Life Act's underscores what President Thomas Jefferson proclaimed in 1809, "No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[55]

[54] *See U.S. Voters Oppose Health Care Plan by Wide Margin, Quinnipiac National University Poll Finds; Voters Say 3-1, Plan Should Not Pay for Abortions*, QUINNIPIAC UNIVERSITY, (Dec. 22, 2009), http://www.quinnipiac.edu/x1295.xml?ReleaseID=1408 (*last visited* June 12, 2012). *See also Poll: Majority favor abortion funding ban*, CNN POLITICS (Nov. 18, 2009), http://articles.cnn.com/2009-11-18/politics/abortion.poll_1_public-option-abortion-issue-health-insurance?_s=PM:POLITICS (*last visited* June 12, 2012).

[55] Letter from Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Connecticut, February 4, 1809.